

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: CIVIL PART
BERGEN COUNTY
DOCKET NO.: L-4966-20
A.D. # _____

STEVEN DOVAL,)	
MELISSA AND CEANA CUELLO,)	
)	
Plaintiffs,)	TRANSCRIPT
)	
vs.)	OF
)	
FAIRLEIGH DICKINSON)	MOTION
UNIVERSITY,)	
)	
Defendant.)	

Place: Bergen County Justice Center
(Heard via Zoom)

Date: February 5, 2021

BEFORE:

HONORABLE ROBERT C. WILSON, J.S.C.

TRANSCRIPT ORDERED BY:

PHILIP L. FRAIETTA, ESQ, (Bursor & Fisher, PA)

APPEARANCES:

PHILIP L. FRAIETTA, ESQ. (Bursor & Fisher, PA)
Attorney for Plaintiff's

ANGELO STIO, ESQ. (Troutman Pepper Hamilton)
Attorney for Defendant

Transcriber: Hollie Bennett
PHOENIX TRANSCRIPTION
796 Macopin Road
West Milford, NJ 07480
(862)248-0670

Audio Recorded
Recording Opr: Not indicated

I N D E X

PAGE

Colloquy re: Housekeeping.....3

MOTIONS: PAGE

Motion to Dismiss.....4

ARGUMENTS: PAGE

BY: Mr. Stio.....4,23

BY: Mr. Fraietta.....13,27

THE COURT:

Decision.....30

1 (Proceeding commenced @ 11:47:43 a.m.)

2 THE COURT: This is the matter of Steven
3 Doval and Melissa Cuello and Ceana Cuello,
4 individually, on behalf of all others similarly
5 situated, versus Fairleigh Dickinson University on
6 L-4966-20. Counsel for the plaintiff who is on the
7 motion, may I have your appearance, please?

8 MR. FRAIETTA: Good morning, Your Honor, this
9 is Phil Fraietta of Bursor and Fisher. I'm joined by
10 my colleague, Alec Leslie, as well as co-Counsel,
11 Antonio Vidoya (phonetic).

12 THE COURT: Yes, but who will be arguing the
13 motion?

14 MR. FRAIETTA: I will, Your Honor -- Mr.
15 Fraietta.

16 THE COURT: All right, Mr. Fraietta, then
17 everyone else who is listening in must put their phones
18 on mute. And, on behalf of Fairleigh Dickinson
19 University, may I have your appearance?

20 MR. STIO: Yes, good morning, Your Honor,
21 Angelo Stio from Troutman, Pepper, Hamilton. I have
22 with me my colleague, Chris Kierri (phonetic) and the
23 general Counsel for FDU, Edward Silver. Angelo Stio
24 will be arguing the motion on behalf of FDU, Your
25 Honor.

1 THE COURT: And, all are welcome to listen,
2 but Mr. Stio, you're the only one who will un-mute
3 their microphone. Everyone else should now be on mute
4 because I believe it is your Motion to Dismiss the
5 plaintiff's complaint. And, I'll hear your oral
6 argument for 10 minutes and then I'll recognize your
7 adversary for 10 minutes. You may proceed.

8 MR. STIO: Thank you, Your Honor. Your
9 Honor, this cases arises from the COVID-19 pandemic.
10 Approximately half way into Fairleigh Dickinson's
11 spring semester, Governor Murphy entered an executive
12 order that required all universities to cease having in
13 person instruction.

14 In response to that executive order, FDU
15 quickly transitioned to a virtual learning environment
16 to deliver an education to its students, save the
17 spring semester, in the only way it was permitted to do
18 so under the law. And, they took that action in
19 accordance with an expressed provision both in their
20 student handbook and in their student bulletin that
21 reserved the right for them to change courses, change
22 schedules, change times, change professors, and offer
23 reasonable alternatives.

24 And, Your Honor, that's what happened here.
25 Now, the plaintiff's have alleged that FDU breached the

1 contract that they had for in person education.
2 Plaintiff's don't point to any expressed provision.
3 They rely on an implied contract. And, what they say,
4 Your Honor, is that there's a course catalog and the
5 course catalog implies a promise of in person
6 instruction because it lists courses, the days the
7 courses would meet, the instructor, and the physical
8 location on campus. So, that's the implied contract --

9 THE COURT: Mr. Stio -- Mr. Stio --

10 MR. STIO: Your Honor, that's not an implied
11 contract --

12 THE COURT: Mr. Stio -- Mr. Stio, can you
13 hear me?

14 MR. STIO: It's general course information
15 and guidance --

16 THE COURT: Oh no, you can't --

17 MR. STIO: There was a case just last week
18 that --

19 THE COURT: Mr. Stio, I -- maybe I need to
20 cut to the case here. Will you at least admit that the
21 students who have a contract with Fairleigh Dickinson
22 -- which was they paid money and you were to provide
23 educational services. I understand that you say that
24 you have fulfilled the contract but they did have a
25 contract; is that correct?

1 MR. STIO: They had a contract to receive or
2 earn the ability to receive credits, yes, -- to get an
3 education.

4 THE COURT: Okay, that's true too. And, now
5 in any contract there may be expressed terms but then
6 the law also says there's implied terms in order to
7 fulfill the purpose of the contract. And, that's
8 standard contract law and a standard jury charge we
9 have here in New Jersey. So, it -- it is a contract
10 and then the contract may have implied terms in
11 addition to expressed terms.

12 And, then there is also an implied term of
13 the covenant of good faith and fair dealing in our
14 contract. I understand that your adversaries have also
15 added a lot of other torts and things that may not
16 survive a Motion for Summary Judgment. But, we'll go
17 back to that there is a contract and now with regard to
18 the contract that these students had, besides earning
19 credits, there were other things that they contracted
20 for that could no longer be provided.

21 While you were providing the education, they
22 may have lost their student activity fees that people
23 who took online courses didn't and you did not refund
24 those. Or they may have had parking fees or a myriad
25 of other things that only those students that were on

1 campus would normally have. But, since they were no
2 longer on campus, they were deprived of the fruits of
3 that. Weren't they entitled to a refund of those kind
4 of things?

5 MR. STIO: So, Your Honor, yes. They
6 received a refund for -- they received a refund of
7 board. They received a refund of room. They received
8 a refund of parking. FDU continued to offer services
9 virtually. And, they only identify two fees in their
10 complaint that they claim were mandatory fees that
11 weren't refunded -- a technology fee which ironically
12 when you're taking classes virtually, it is off
13 technology, and a wellness fee and we point it out in
14 our reply brief that FDU has wellness applications and
15 continued to offer counseling and wellness services
16 remotely.

17 And, we cite to the same website that they
18 have relied upon in their complaint for their
19 allegations. So, they can't say you didn't provide a
20 service. Their whole claim, Your Honor, is well the
21 service you provided was subpar. And, that gets into
22 education malpractice because New Jersey law makes
23 clear that if the Court is required to judge the
24 quality of education, that's education malpractice and
25 it's barred.

1 And, this isn't a case where they didn't
2 receive a service. They're asking this Court to say
3 look at what in person instruction is, look at what
4 virtual instruction is, and you, Court, need to make a
5 quality determination as to what damages exist. That's
6 not permissible under New Jersey law.

7 I also just want to point out, Your Honor,
8 that with all due respect an implied contractual
9 (indiscernible) that the Court has cited is a little
10 different in the college and university context. And,
11 I would direct the Court's attention to our brief on
12 page 21 and our reply brief at four, in particular,
13 Mitra (phonetic), Cruz, and Barker cases.

14 In addition, there's the (indiscernible) case
15 that said, yes, there is a quasi-contractual clause of
16 action for breach of a policy or provision in a
17 handbook. But, the University needs flexibility and
18 the inquiry there is on whether there's bad faith.
19 There is not a single allegation in this complaint of
20 bad faith.

21 In fact, the plaintiff's concede that FDU had
22 no other alternative but to continue the semester with
23 virtual education. And, I would add Your Honor that
24 one of the plaintiff's, Ms. Ceana Cuello, actually
25 graduated on time and did not have her education

1 delayed.

2 And, I would submit to the Court that if FDU
3 shut down everything, we would be here with Ms. Cuello
4 filing a complaint saying you delayed my education, I
5 was delayed getting into the work force and I'm
6 entitled to damages.

7 So, the other thing I want to point out, Your
8 Honor, is yes there can be implied provision, but
9 implied provisions and the breach of duty of good faith
10 and fair dealings under New Jersey law, again, they
11 cannot replace expressed provisions.

12 And, there cannot be a contract here because
13 there is two very explicit reservation of rights
14 provisions that unquestionably give FDU the right to
15 change courses, to change schedules, to change the mode
16 of instruction, and provide reasonable alternatives.

17 That's what happened here. We had a once in
18 a lifetime global pandemic. It's the unexpected. It's
19 the reason this reservation of rights provision is in
20 the course catalog and the student handbook. FDU had
21 every right to do this in order to fulfill its
22 charitable educational purpose, which is continue to
23 provide an education to students.

24 And, I would submit to the Court that there
25 is no breach of contract because of that expressed

1 language in both the handbook and the student catalog
2 that gives FDU every right to do what it did here.
3 Under the circumstances, it continued to provide an
4 education. It continued to provide educational support
5 services, albeit virtually.

6 This is not a case where nothing was provided
7 and FDU took the tuition and fees. Quite to the
8 contrary, FDU had to expend significant sums -- sums of
9 money to transition almost instantly from in person
10 instruction to virtual instruction to allow its
11 students to have and continue their education unabated.

12 I would submit that that is what the Court
13 should rely upon for the breach of contract. Under the
14 unjust enrichment claim, Your Honor, I would point out
15 that the unjust enrichment claim is based on the same
16 promise of in person instruction. And, if the contract
17 claim fails, the unjust enrichment claim fails.

18 But, separately, if the Court believes there
19 is a contract, there is no unjust enrichment claim.
20 The conversion claim here fails because -- for two
21 reasons. One, Your Honor, is that you cannot have
22 conversion and turn a contract into a tort claim. But,
23 two, you cannot have a conversion claim when there's
24 not a specific identifiable corpus.

25 There was never intention for a refund here.

1 The intention was you're going to pay money, it's going
2 to be put into the (indiscernible) for the charitable
3 purpose and we're going to provide an education. The
4 law says you cannot have a conversion claim under those
5 circumstances and I would direct the Court to, again,
6 the Fordham case that came out last week in support of
7 that.

8 And, then finally, money had and received
9 under New Jersey law, we cited in our brief, is no
10 different than an unjust enrichment claim. There's
11 nothing unjust here about a university fulfilling its
12 charitable purpose, using the tuition to provide an
13 education. This isn't a situation where Mr. Doval's
14 son or Ms. Cuello did not receive the credits that they
15 had the classes for.

16 THE COURT: Thank you very much.

17 MR. STIO: I'm happy to answer any questions.

18 THE COURT: No -- no, I -- I want to hear
19 from your adversary. Can I have your appearance?

20 MR. FRAIETTA: Yes, Your Honor, this is Phil
21 Fraietta for the plaintiff's. Good morning. I'd like
22 to --

23 THE COURT: Good morning, Mr. Fraietta. Good
24 morning, Mr. Fraietta. Well, before you do what you
25 want to do, I think you better focus in on contracts

1 because basically your conversion and your unjust
2 enrichment would probably fail if you're maintaining
3 that there was a contract which I believe you are.
4 And, then you don't have a quasi-contract. You have a
5 contract.

6 Now, with a contract, if you look at any of
7 our standard New Jersey jury charges, you're going to
8 find out that there's an -- that implied terms can be
9 made by a jury even to an expressed contract. And, I
10 don't believe there's an integration clause. And,
11 additionally, you're going to find that there is a
12 covenant of good faith which is an implied contract.

13 You might even be able to get a separate
14 cause of action for that, but I don't think you pled it
15 that way. But, if you want to try to go with the hard
16 counts that's -- that's fine. And, additionally, I did
17 read in your brief something to the effect that, while,
18 I don't think you're looking for an entire refund, you
19 are looking for some contract damages.

20 And, that -- in your brief, you say
21 furthermore, plaintiff's were assessed several fees in
22 addition to their tuition that were paid in exchange
23 for support of their in person, on campus education.
24 These fees, which included the \$924 technology fee and
25 \$140 university wellness fee were significantly higher

1 than corresponding fees that were assessed to students
2 who signed up for FDU's online only program.

3 So, you do -- and I think your adversary
4 admits that there is a contract and then you do cite
5 that there are some damages. And, you do state that as
6 such there was a breach of contract and therefore the
7 motion should be denied. But, now you can tell me what
8 you actually do state.

9 MR. FRAIETTA: Yes, and thank you, Judge,
10 I'll certainly take that guidance and -- and we agree
11 with you, we believe that this is, first and foremost,
12 a breach of contract case. So, what I'd like to do is
13 I'd like to start by explaining what this case is and
14 what it isn't.

15 So, Mr. Stio laid out a different case than
16 the plaintiff's have pled. We are not challenging
17 FDU's response to COVID-19. This is not a COVID-19
18 litigation. We're not challenging Governor Murphy's
19 executive orders.

20 What we are challenging was FDU's decision to
21 keep the tuition and fees despite moving the courses
22 online and in doing so, breaching their contract. So,
23 the example that I like to give, Judge, is if I paid a
24 painter to come and paint my house and the house blew
25 down between the time that I paid and the time that he

1 came to paint it, he can't keep the money.

2 That's just black letter contract law that he
3 would need to refund the money. And, that's not what
4 happened here. So, -- so I think that's important
5 because it goes to the educational malpractice claim
6 and this is --

7 THE COURT: Well, you may -- you may want to
8 talk about contract law. And, what the defendant's are
9 basically saying is that you had a contract. Your
10 contract was to obtain education and credits and they
11 fulfilled that. There was a modification of how they
12 filled that but there was a supervening cause that
13 required them to make the modification.

14 But, yet they still filled the essential
15 elements of what you contracted for. And, as such,
16 you're not entitled to a refund since you did get the
17 education course and you did get the credits that you
18 had contracted for.

19 MR. FRAIETTA: Understood. And, where -- we
20 think that defense fails for a few reasons. But, the
21 gist of the reason is that that defense assumes that
22 the contract was simply for education. And, I think
23 the complaint makes clear that that's not the case.
24 So, for instance, Your Honor, at paragraph 36 of the
25 complaint, we discuss FDU's online program.

1 So, they offer a program for students who do
2 want to take courses online just for the benefit of
3 receiving credits. And, that program is offered at a
4 program of 50 percent less than a standard FDU tuition.
5 So, -- so we think that that fact alone emphasizes that
6 there is some sort of a price premium affiliated with
7 in person education and a promise that if you're not in
8 our online program, you're in our in person program.

9 Additionally, paragraph 33 of the complaint,
10 we cite FDU's discussion of its campus and how its
11 campus provides you with "the classic college
12 experience." And, the University boasts its
13 fraternities, its sororities, its student activities,
14 its intramural and collegiate athletic programs,
15 etcetera, etcetera.

16 These are all part of what the plaintiff's
17 contracted for at the beginning of the Spring 2020
18 semester. So, I -- I think it would be disingenuous of
19 FDU to suggest that well all of that is just extra
20 fluff. The only thing they really contracted for is
21 credits. And, again, the fact that they offer an
22 online program that offers just credits cuts against
23 their argument.

24 I also would like to point out, Your Honor,
25 that Mr. Stio mentioned the Fordham case and that's a

1 big distinguishing factor of the Fordham case. Fordham
2 University does not offer a distinct online program.
3 And, Judge Wood, in her opinion, noted that.

4 So, we believe that there is a contract here
5 and a contractual promise to provide the in person
6 educational experience. That was denied to the
7 students and therefore it's a breach and with a breach
8 of contract, you're entitled to a refund.
9 Additionally, Mr. Stio argued that there's a
10 reservation of rights clause and the reservation of
11 rights clause in his mind -- words, to paraphrase,
12 gives the University the right to do whatever it wants,
13 essentially.

14 And, that's just not true under New Jersey
15 law. So, this is at pages 17 and 18 of our brief.
16 But, to quote the Court in the case of Bain versus
17 Union City College, that's 2018 Westlaw 566, 207,
18 District of New Jersey, in 2018, that Court said that
19 the language that sums to subject to change does not
20 constitute a specific sufficient disclaimer. And,
21 that's because, like in all contract law, ambiguous
22 clauses are interpreted against the drafter.

23 So, here FDU's reservation of rights clause
24 reads that the University reserves the right to change
25 without notice the contents of its bulletins and to

1 modify its academic calendars and programs of
2 instructions, etcetera, etcetera. That -- it doesn't
3 say the University has the right to switch to online
4 courses midway through the semester.

5 So, a reasonable student reading that
6 provision would understand it and our clients did
7 understand it to mean the University could say, for
8 instance, to receive an economic degree you need to
9 take an additional statistics course from when you
10 originally enrolled. We've -- we've -- the economics
11 department has decided that that too is now required --
12 that kind of thing.

13 Or math -- calculus 101 is going to be taught
14 in lecture hall two instead of lecture hall one. It
15 doesn't allow them to change the entire nature of the
16 contract and that's what they did here.

17 And, one of the cases we cite from a Michigan
18 state Court points out that reading the clause a
19 defendant -- as broad as a defendant would like to,
20 could lead to the absurd conclusion that the defendant
21 could offer classes for a day and then cancel the rest
22 of the semester and keep the money because they reserve
23 the right to change it so we decided that you only need
24 to take one class to graduate instead of the entire
25 semester.

1 It's clearly -- it cannot be the case, Your
2 Honor. So, we just think that the reservation of
3 rights defense fails. It's also premature for the
4 reasons that I got into. It requires an understanding.
5 And, Your Honor mentioned this with New Jersey contract
6 law, that jurors can find implied terms in the
7 contract.

8 So, I -- I don't quite understand how we can
9 determine as a matter of law on the pleadings alone
10 that there was no promise for in person education here.
11 So, to move on then to the educational malpractice
12 defense where I was headed earlier, the --

13 THE COURT: You said -- you said you really
14 weren't ever pleading that -- anything about a
15 sub-standard education, you were pleading about that --
16 they literally didn't get their in person education,
17 they got an online education, and that's not what they
18 contracted for so they should, at the very least, be
19 charged what an online course goes for, not what an in
20 person class goes for.

21 MR. FRAIETTA: Correct, and that's why the
22 overwhelming weight of authority concludes that these
23 claims are not grounded on educational malpractice.
24 And, that's in Court's all across and we cited that in
25 our papers. There are, by my count, at least 15

1 decisions that we cited that come to that conclusion.

2 So, moving on to the fees, Mr. Stio mentioned
3 two mandatory fees, the technology fee and the wellness
4 fee -- and, again, Judge --

5 THE COURT: I think you actually mentioned --
6 I mentioned it because I quoted it from your brief from
7 page 15 at the bottom.

8 MR. FRAIETTA: Yes, and Mr. Stio argued that
9 the technology fee was clearly needed to put the
10 courses to Zoom and the wellness fee was still offered
11 for students to, I guess, remote counseling and things
12 of that sort. And, again, understood and point noted,
13 however as we plead and write in the brief, those fees
14 are not assessed to students who sign up for online
15 programs.

16 So, there is a difference between the
17 technology fee and the wellness fee for the in person
18 students versus the online students. And, -- and
19 essentially, as Your Honor just summarized our case, if
20 the semester was going to be conducted online or if
21 half of the semester was going to be conducted online,
22 we want to be charged like the online students would
23 have been charged for that half of the semester, which
24 is approximately 50 percent less based on FDU's --

25 THE COURT: So, you're not saying -- you are

1 not claiming that, in fact, that you should be entitled
2 to a full refund of everything paid because you did
3 have the benefit of their online -- your student --
4 your clients did participate and so you're not --
5 you're not in any way saying you're entitled to a full
6 refund because the pandemic required the steps that
7 Fairleigh Dickinson took. But, that you say that you
8 should just get what the benefit of the bargain is for
9 people who take the online as opposed to the people who
10 were no longer able to go in on campus?

11 MR. FRAIETTA: Correct, Your Honor, exactly.
12 And, that -- that's the right term for it. It's the
13 benefit of the bargain. It's simple contract damages
14 that any first year law student learns. And -- but the
15 Court in the Rosado (phonetic) case which is cited in
16 our brief -- the name of the defendant escapes me but
17 it's a different university, in that case the Court
18 draws an analogy that I think is appropriate.

19 If I buy -- contract for a Cadillac but
20 receive, an Oldsmobile, well the Oldsmobile still
21 drives, it gets me from point A to point B, but the
22 market price of the Oldsmobile is clearly less than the
23 Cadillac and therefore I get the benefit of the bargain
24 in the contract suit.

25 THE COURT: You're -- you're rather old

1 aren't you? First of all, they haven't made
2 Oldsmobile's in a long, long time and you know maybe
3 somebody like myself, who is even probably older than
4 you are, remembers Cadillac's and Oldsmobile's. They
5 usually had the same engine and they were certainly
6 made by the same overall manufacturer, but I get the
7 analogy. Anything else -- anything else?

8 MR. FRAIETTA: I -- I'm old enough to
9 remember the Oldsmobile to be honest with you, Your
10 Honor, but I'm just quoting the Court in the Rosado
11 case. But, no there's not much else to --

12 THE COURT: Unfortunately -- unfortunately,
13 it was my first car.

14 MR. FRAIETTA: I hope -- I hope you enjoyed
15 it, Your Honor, but --

16 THE COURT: I did -- I thought it was grand.

17 MR. FRAIETTA: But, no there isn't much else
18 to --

19 THE COURT: And, glorious. Is there anything
20 else I need to know about the motion was to why it
21 should be denied?

22 MR. FRAIETTA: I don't think so, Your Honor.
23 To briefly summarize, to us, it's a -- this is a simple
24 breach of contract case and the -- the fact that the
25 defendant is a university does not change black letter

1 contract law. If -- if I may, I would like to be heard
2 on the quasi-contract claim. I understand that Your
3 Honor knows --

4 THE COURT: Well you know I've already seen
5 this happen where a Judge actually charged
6 quasi-contract and had a breach of contract case and
7 the Appellate Division took umbrage with that Judge.
8 Thankfully, it wasn't me. But, I'm not sure how you're
9 going to get unjust enrichment if you're pleading
10 contract and contract damages. But, we'll -- we may
11 leave that to another day if I deny the motion to see
12 how you fair in discovery. I know you --

13 MR. FRAIETTA: That's what I was going to
14 say, Your Honor -- we're brining those claims --

15 THE COURT: And, I know that's what you --
16 that you did it as an alternate pleading.

17 MR. FRAIETTA: Correct.

18 THE COURT: I'm not even sure how you're ever
19 going to get to conversion as a tort which usually
20 involves (indiscernible) as your adversary had pointed
21 out. But, that's why I wanted you to argue about
22 contract law because if you were going to go with
23 anything that seemed to be the best cause of action.

24 MR. FRAIETTA: Noted and agreed, but for the
25 purposes of the record, I just wanted to state that we

1 do bring the quasi-contract claims including unjust
2 enrichment and the alternative. And, at this stage in
3 litigation we believe that they can proceed in the
4 alternative until the summary judgment stage where --
5 as Your Honor indicated, if the contract is proven that
6 may be different. But, at this stage, we believe they
7 can proceed in the alternative.

8 THE COURT: Very good. I'd like to hear back
9 from Fairleigh Dickinson so I believe I will recognize
10 Counsel for Fairleigh Dickinson.

11 MR. STIO: Thank you, Your Honor. Your
12 Honor, I want to point out -- I'll start with the
13 implied contract. I would direct the Court --

14 THE COURT: Could you -- could you -- could
15 you do me a favor, for the record? Could you start
16 with your name?

17 MR. STIO: Yes, Your Honor --

18 THE COURT: Could you start with your name?

19 MR. STIO: Yes, sure Your Honor. My
20 apologies. Angelo Stio from Troutman Pepper Hamilton,
21 Your Honor.

22 THE COURT: Thank you.

23 MR. STIO: Your Honor, I'll start with the
24 implied contract principles. I -- I understand the
25 Court's position, but I would direct the Court to read

1 the decisions in Mitra, Cruz, Romero, and the Berry
2 (phonetic) case which was decided on a Motion to
3 Dismiss and affirmed by the Appellate Division which
4 all said that applied contractual principles do not
5 apply in the student university context.

6 New Jersey law is unique on that. And, what
7 plaintiff's are trying to do is cherry pick provisions
8 that they like and then require the University to have
9 rightful precision with expressed provisions from the
10 same document they rely upon. And, the Berry Court on
11 a Motion to Dismiss said you can't do that.

12 If there's an implied contract here, it
13 included the reservation of rights provision and the
14 reservation of rights provision gives the University
15 the opportunity to do exactly what it has done here.
16 That's the case we have.

17 Second, the plaintiff's have said, well they
18 charge less for online courses. What the plaintiff
19 doesn't tell you and what we cited in our brief and we
20 even gave you the website address, which they rely upon
21 for their allegations, so the Court can consider it, we
22 don't offer degrees in nursing and we don't offer the
23 courses in political science that Mr. Doval's son has
24 taken and the nursing courses that Ms. Cuello took
25 online.

1 There is a small universe of classes that are
2 online and none of the classes here are online. So, to
3 say well we can charge the same amount and you can get
4 the damages, doesn't work because they couldn't take
5 any of these courses online when they registered. They
6 couldn't have any of these full-time faculty teaching
7 the courses online when they registered.

8 What they're asking you to do, Judge, is to
9 go in and look at the quality of what they received.
10 And, Court's, time and time again, have said if it
11 involves quality, you cannot have a contract or even a
12 tort claim because it is education malpractice.

13 I also want to draw the Court's attention --
14 my adversary said well there's all of these promises in
15 the University publications about the campus life and
16 how expectations are on campus. Footnote one in our
17 reply brief lists specific cases in the university
18 context where the Court's have said, you cannot have an
19 enforceable promise arise from indefinite statements
20 about campus life.

21 That's what they are trying to put here as a
22 contract. And, Your Honor, there may be a contract,
23 but there is not an expressed agreement here. They
24 have not come forward with any written document that
25 says you get this in exchange for X.

1 They're saying there's an implied agreement.
2 That implied agreement is that you have to provide in
3 person instruction under every circumstance and you
4 have to live by the letter of the course catalog.

5 In short, you disregard and you don't have to
6 even consider expressed languages. It says the
7 University can change it because they have to be
8 specific in their expressed language but we could tell
9 you what the implied language is and you have to accept
10 it. That doesn't make any sense. That doesn't follow
11 New Jersey law.

12 And, I think that it's going to set a
13 horrible precedent if Court's are going to allow
14 students to come in and say, well I was supposed to
15 have a course in the new academic building, there was a
16 flood, it got changed to the old academic building and
17 because of the lighting and the air conditioning, I
18 wasn't able to get an education.

19 Universities which are non-profits would die
20 a slow death of a thousand cuts. They can't do that.
21 And, that's why the Berry case says, you need to look
22 at whether the university acted in good faith. Mr.
23 Fraietta admitted in his oral argument no one says the
24 University acted in bad faith. That submission is
25 fatal for the breach of contract claim.

1 They don't have a breach of contract claim
2 because what we did was authorize, under the expressed
3 reservation of rights provision, from the same
4 documents they want this Court to imply promises, and
5 you can't do that. I'll be happy to answer any
6 questions the Court has.

7 THE COURT: No, thank you. I'll hear your
8 adversary in rebuttal.

9 MR. FRAIETTA: Thank you, Your Honor. I'd
10 like to respond to at least two of the points that Mr.
11 Stio --

12 THE COURT: Can I have your appearance then
13 for the record?

14 MR. FRAIETTA: Yeah, I apologize, this is Mr.
15 Fraietta for the plaintiff.

16 THE COURT: Thank you, Mr. Fraietta. You may
17 proceed.

18 MR. FRAIETTA: I'd like to respond to two of
19 the points that my adversary laid out there. The first
20 is on damages. So, as an initial matter, we don't need
21 to prove damages at the pleadings stage. We only need
22 to show the existence of them. We don't need to state
23 the amount certain under New Jersey law.

24 But, nonetheless, the argument that the
25 damages inquiry is going to require a look into the

1 quality of the education is simply not true. And, this
2 is recognized by the Court in the matter of Bergeron
3 versus RIT which we submitted as supplemental authority
4 to the Court yesterday, I believe. And, it's a recent
5 decision that came out after our opposition brief was
6 filed.

7 But, in Bergeron, the Court notes and Counsel
8 explains that damages in a case like this can be
9 determined at the appropriate time by experts to simply
10 determine what is the difference between the online
11 price and the in person price. And, in this particular
12 case, it's easy because FDU gives us that difference.
13 They give us the difference of online school versus in
14 person school.

15 So, I -- this is a simple market analysis.
16 It's how much would the reasonable consumer have paid
17 had the reasonable consumer known the semester was
18 going to be half online. That does not require the
19 Court to look into the quality of the damages. That's
20 accepted by Bergeron and we would urge Your Honor to
21 agree with that decision.

22 As a secondary matter, Mr. Stio mentioned the
23 -- what I guess is the domino effect, so to speak, of
24 if Your Honor were to deny this motion that students
25 would run in and sue their university for every little

1 change, but I think that's misstating what happened
2 here. This is not a situation where FDU changed the
3 chemistry class from lab number one to lab number two.

4 This is a situation where FDU changed the
5 entire nature of the academic program. Instead of an
6 in person experience on its campus -- on its beautiful
7 campus I should say, it was relegated to the internet
8 on Zoom in their parents basement. It's -- it's just a
9 completely different animal than what was bargained for
10 and we think it's -- it's a distinguishable fact for
11 that matter.

12 The educational malpractice doctrine and the
13 requirement of bad faith, as Mr. Stio says, has merit
14 in some instances. I would agree that the state of New
15 Jersey doesn't want a student to say, hey, you know I
16 thought that my history professor just -- he had a bad
17 week so I'd like a little bit of money back, he wasn't
18 really all with it. But, that's not what this case is.

19 This case is about changing the whole major.
20 And, to conclude on the bad faith prong, I just want to
21 clarify, our position is not that FDU did not act in
22 bad faith. We don't think FDU acted in bad faith by
23 transitioning to online education as was required by
24 Governor Murphy's order. We think they acted in bad
25 faith by keeping the money.

1 Governor Murphy did not order the University
2 to keep the money. They -- they very easily could have
3 and should have refunded the tuition and that's
4 recognized by their decision to refund room and board
5 as Mr. Stio mentioned earlier which (indiscernible)
6 completely arbitrary decision -- why you would refund
7 one and not the other.

8 So, we do challenge that. Even if a bad
9 faith standard was required, and I don't think it is
10 for the reasons stated in our brief, but even if it
11 was, there is a bad faith decision here, and it's to
12 keep the tuition money despite not delivering what was
13 promised. And, with that, I'm happy to answer any
14 questions.

15 THE COURT: No, the Court has before it a
16 Motion to Dismiss the plaintiff's complaint. And,
17 again, with regard to this, there -- there is a
18 contract. I think both parties agree that there is a
19 contract.

20 But, the Court is also mindful that our law
21 requires that when the contract terms are ambiguous or
22 the parties dispute their meaning, construction of the
23 contract and the application of any evidence submitted
24 to prove the surrounding circumstances, are for a jury.
25 And, that would be State Farm Mutual Auto Insurance

1 Company.

2 Additionally, we know that with regard to
3 contracts, we have to have a jury determine what the
4 loss was and what the contract damages are. We do know
5 that there was a modification and the question then
6 becomes -- and, again, it is a claim of breach, whether
7 the essential terms of the contract were fulfilled by
8 the University or whether there was, in fact, a
9 meaningful breach that robbed the plaintiff of a
10 substantial part of the bargain.

11 On the other hand, the defendant is arguing
12 that the defendant substantially performed the contract
13 and as such made a good faith effort that actually
14 achieved the essential purpose of the contract and
15 provided the plaintiff with the fundamental benefits
16 that the plaintiff was supposed to receive from the
17 contract.

18 All of this brings us back down to a Motion
19 to Dismiss. Under New Jersey Court Rules a complaint
20 may only be dismissed for failure to state a claim and
21 after an in-depth and liberal search of its allegation
22 a cause of action cannot be gleaned even from an
23 obscure statement in the complaint, particularly if
24 additional discovery is permitted. See New Jersey
25 Court Rule 4:6-2E as citing Printing Mart versus Sharp

1 Electronics, 116 N.J. 739,746 (1989).

2 Thus, the Court must give the non-moving
3 party every inference in evaluating whether to dismiss
4 a complaint. The test for determining the adequacy of
5 a pleading is whether a cause of action is suggested by
6 the fact, back to Printing Mart. Now, there are some
7 additional causes of action in here which I believe
8 will eventually have to be dismissed upon the
9 completion of discovery.

10 But, they are all entwined with the same
11 factual scenario, that is, the contract claim that the
12 plaintiff has brought. As such, the Court is going to
13 be denying the Motion to Dismiss at this juncture,
14 pending the completion of discovery, and then it would
15 be more appropriate as a Motion for Summary Judgment.
16 And, that is the decision of the Court for the reasons
17 stated on the record. All be well and have a good
18 afternoon.

19 (Proceeding concluded at 12:27:24 p.m.)
20
21
22
23
24
25

1

CERTIFICATION

I, Hollie Bennett, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CourtSmart, Index No. from 11:47:43 to 12:27:24, is prepared to the best of my ability and in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings, as recorded.

/s/ Hollie Bennett

Hollie Bennett

AD/T 695

AOC Number

Phoenix Transcription LLC

Agency Name

02/09/21

Date